IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

PITT RIVER TRIBE OF INDIANS,

Petitioner,

v.

PACIFIC GAS AND ELECTRIC COMPANY, THE HEARST CORPORATION, KIMBERLY-CLARK CORPORATION, PUBLISHERS FOREST PRODUCTS, DIAMOND INTERNATIONAL COMPANY, FRUIT GROWERS SUPPLY COMPANY, U. S. PLYWOOD CORPORATION, and SOUTHERN PACIFIC LAND COMPANY,

Respondents.

NO. 75-1286

PETITION FOR CERTIORARI

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I

These cases were filed in the Superior Court of the State of California, where a general demurrer was sustained on identical grounds (the complaints being, for all practical purposes, identical). A petition for an evidentiary hearing on the question of violation of the First, Fifth and Ninth Amendments to the Constitution was filed. The hearing was denied. The Court of Appeal sustained the judgments on the demurrers and the Supreme Court denied a hearing. The opinion of the Court of Appeal and the record of the Supreme Court's action (December 11, 1975) are contained in the Appendix.

II

Jurisdiction is conferred by 28 U.S.C. 1257.

III

The questions presented for review are:

1. Whether the title of an Indian Tribe, which was not, nor was its land, included in Section 16 of the California Private Land Claims Act, and whose land was not confirmed as a Spanish or Mexican grant under said Act, was extinguished because it failed to file a claim under said Act.

2. Whether, under the same circumstances, title was extinguished despite the fact that the

failure to claim was because of the following: (a) its "guardian", the United States Government, fraudulently failed to notify it of the necessity to file a claim and (b) force and violence, and the threat of force and violence committed, supported and protected by representatives of the State of California and the United States.

3. Whether the complaint states a cause of action under Cramer v. United States, 261 U.S. 219.

4. Whether an Indian Tribe has any recourse to the courts to restore its possession which it was maintaining under the mantle of the fourth proviso of Section 6 of An Act to Provide for the Survey of the Public Lands of California; or it had lost its possession by reason of murder and genocide committed by the patentee in order to be able to obtain a patent on the land in question.

IV

This case involves the First, Fifth and Ninth Amendments to the United States Constitution, the California Private Land Claims Act (9 Stat. 631) and An Act to Provide for the Survey of the Public Lands of California (10 Stat. 244); the statutes being set out in the Appendix.

V

The federal questions were raised and passed upon as follows: (a) in the complaint, by the sustaining of the demurrer, (b) in the petition for a "constitutional fact" hearing, by the refusal of such a hearing, (c) in the oral and written argument, by the sustaining of the demurrer, and (d) in the appeal, through written and oral argumentation, by affirmance of the judgment.

VI

ARGUMENT

BACKGROUND OF THIS LITIGATION:

> "Upon this point a page of history is worth a volume of logic." (Justice Holmes, N.Y. v. Eisner, 256 U.S. 345, 349).

The fundamental policy and law of the United States with reference to Indian land was fixed at the time of the foundation of the Government. It was presented to Congress on behalf of President Washington, was formulated in the Northwest Ordinance, and was enunciated by a long series of Supreme Court decisions.

> "The utmost good faith shall always be observed toward the Indians; their land and property shall never be taken from them without their consent." 1 Stat. 50.

From that time until today Indian land was acquired by the United States Government with such consent (oftentimes a coerced consent, as this Court has pointed out).

The primary method for securing this consent was treaties (until 1871). In 1852 it seemed that the national pattern was to be repeated in California when Congress acceded to the President's request for $25,000 to "treat with California Indians." Sept. 28, 1850, 9 Stat. 558; another $25,000 voted on February 27, 1851, 9 Stat. 572.

Commissioners were appointed who entered into 18 treaties with various purported representatives of Indian Tribes; which treaties were interpreted by the Government as extinguishing Indian Title in all of California (approximately 100 million acres) in exchange for approximately 8 million acres of reservations.

On June 1, 1852, President Fillmore communicated these treaties to the Senate which, on July 8, 1852 refused to ratify them in Executive Session. What followed was rather unprecedented: the Senate ordered them filed under an injunction of secrecy which was not removed until they were accidentally discovered by a Senate clerk in 1905. Not only

were the Indians never notified of the failure to ratify the treaties, but Government representatives hurried them off their land to occupy the reservations. Those that left their land were not permitted to occupy, or at least to continue to occupy the promised reservations.

The question of California treaties was never raised again except when one tribe fought the United States Army sufficiently to a standstill so that they ended up with a treaty and a reservation some years later.

Beginning in 1848, with the discovery of gold, miners, settlers and a large number of unsavory characters began to occupy the State. Because Indians were occupying the "gold" areas and some of the best agricultural land and objected to the intruders destroying their source of food, raping their women and kidnapping their children, there were a large number of physical attacks made on the Indians. A skeletal documentation appears in the Appendix.

The net effect was that an estimated 50,000 to 75,000 Indians either died or were driven out of the State in the first five or six years after

the discovery of gold. The genocide continued, so that by 1871 the remaining Indian population was estimated at a low of 13,000 and a high of 20,000; whereas in 1848 it had been somewhere between 100,000 and 250,000. There is ample documentation, including admissions, about the supporting role of the State and Federal governments in this genocide.

Unlike many Indian Tribes elsewhere in 1850, the California Indians were all on their ancestral land, and each Tribe had its well demarcated territory. By 1870, as a result of the deaths and the scattering of the Indians, only a small proportion of the tribal land was occupied by its owners.

Petitioner Pitt River Tribe was somewhat unique among the California Tribes. Protected by the mountains and hard-to-reach areas, far distant from the centers of population, not in the gold fields, and endowed by nature with ample food and great vigor and strength, the genocidal toll among Pitt River Indians was much less than elsewhere in California.

As a result, the Tribe's Indian occupancy of their former land, while not fully maintained, did continue to a larger extent than anywhere else in

California. Furthermore, their regrouping as a Tribe came earlier and proceeded farther than in the case of any other Tribe.

By 1920 they were already communicating with and sending delegations to the Government in Washington, making demands for land.

With the passage of the Indian Claims Commission Act in 1946, the Tribe filed a Petition. On this Petition the Tribe succeeded in obtaining a Judgment of Liability, at which point the Government urgently sought a settlement. A settlement was worked out without the Tribe's knowledge and against their wishes. They voted the settlement down, but the Indian Claims Commission disagreed and approved the settlement.

Thereafter, the Tribe, hampered because its attorney had turned on it, tried to stop the settlement with pressure on Congress and the Executive and finally, in the main, refused the settlement checks.

Midway in this fight on the settlement the Tribe, feeling frustrated in its efforts, decided upon a tactic of occupying -- more properly reoccupying -- portions of its ancestral land.

It occupied land "belonging" to P.G.&E., The U. S. Forest Service and Lassen National Park. These tactics were met uniformly with the argument that they were illegal, improper and disoriented to success in returning the Tribe's land. The Tribe was strongly urged by the United States Government and P.G.&E. to utilize the courts as the proper legal way to get its land back if it was entitled to do so. Responding to these pressures and arguments, the Tribe brought suit against a number of large corporations which, in total, claimed ownership of at least 500,000 of the Tribe's 3-1/2 million acres.

THE CALIFORNIA PRIVATE LAND CLAIMS ACT, 9 Stat. 631

After the Treaty of Guadalupe Hidalgo, as required not only by the Treaty but also by the law of Nations, the Government was obliged to separate those parts of California in which title was held under Spanish or Mexican law in order to respect such title. The rest of the land would, of course, become part of the public domain. The statutory vehicle adopted in California was somewhat different, in form, than that used in other areas, but the

purpose was the same. In his 1857 Report, the Secretary of the Interior sums up the history and function of the Private Land Claims Statutes:

> "This great inheritance was acquired, first by the voluntary cessions of several of the original thirteen States; then by the Louisiana purchase obtained from Napoleon by the treaty of 1803. The next enlargement of our territory was effected by the treaty of 1819 with Spain, ceding the Floridas to the United States; then its further extension was effected by the treaty of 1848, at Guadalupe Hidalgo, with Mexico, ceding New Mexico and California. Subsequently, Texas accepted the proposition of this Government establishing her boundaries for the 'relinquishment by the said State of all territory claimed by her exterior to said boundaries.' The last accession to the public domain is that, in 1854, from Mexico, known as the 'Gadsden purchase,' covering a surface of 23,161,000 acres, south of the Gila river.
>
> The Supreme Court has said, in reference to acquired lands, that 'the people change their sovereign; their right to property remains unaffected by this change.' Consequently, when the United States succeeded to the ownership of that portion of our territory derived from treaties with foreign Powers, the first and paramount duty in the disposal of the public lands was to separate private from public property.
>
> In obedience to this well-settled principle of public law, and under the especial obligations of treaties, the United States have established boards of commissioners, conferred powers on

registers and receivers, opened the courts of the United States for the adjudication of foreign titles, and in multitudes of cases confirmed such titles by special acts of legislation.

These classes of titles are known under the generic description of 'private land claims,' and are of every species, from minute parcels in the form of lots in Spanish towns to rural claims, ranging in size from one hundred arpents and less to a million and a half acres.

These titles are of British, French, Spanish, and Mexican origin, all depending for validity on the colonial laws of their different sovereigns. ... In the growth of our immense territory, in the way and by the means already mentioned, there remained and still remain unextinguished, the claims, rights, and possession of the aborigines. The General Government of the Union, at the dawn of our political existence, adopted the principle asserted by the colonizing Governments of Europe, to the effect that the absolute title was in the United States, subject only to the Indian right of occupancy, and with the unconditional privilege of extinguishing that right.

Under the operation of these principles, the purchase and extinguishment of the Indian right has been gradually progressing in the ratio in which lands in Indian occupancy were demanded by our people for settlement. Pari passu have the lines of the public surveys been carried, in preparing the way for homesteads, and the means by which to pass to our people unincumbered and indefeasable titles." (Report of Secretary of the Interior, Dec. 3, 1857, Cong. Globe, 35th Cong., 1st Session, App. p. 14).

The Secretary of the Interior was in the key position vis-a-vis California Indians and their land. In his Department were the Commissioner of Indian Affairs and the Commissioner of the General Land Office. In addition, he was the chief administrator of the 1851 Act. It was he who instructed the California Land Commissioners in their duties. It was he who made decisions and reported to Congress on the land, and all other problems, of the California Indians. If anybody entertained the thought, either that the Indian Title was being extinguished or that they were going to be obliged to file claims under the Act, would he not have reported to Congress on developments and problems and progress?

Neither the Secretary of the Interior nor the Commissioner of Indian Affairs mentioned the 1851 Act in their 1851 Report. The only Indian land-related issue reported on in the Secretary's 1852 report was the rejection of the treaties, about which he commented merely that it was up to the Senate to announce policy as to future negotiations, or up to Congress "as to removal from California and to provide them some place of

refuge" (Cong. Globe, Vol. 28, 32nd Cong., p. 17).

Neither in 1852, 1853, 1854 nor any of the years following was the 1851 Act or extinguishment of Indian Title mentioned except in the 1857 Report.

Is it not judge-made law that the construction of a statute by the department charged with its administration has "very great force and generally a controlling one in the formation of the judgment of this Court."? St. Paul Railway v. Phelps, 137 U.S. 528.

The perspective of the Congress in adopting the California Private Land Claims Act (referred to as the 1851 Act) was no different than the just-quoted statement of the Secretary of the Interior. That is to say, Congress never intended Indian Title to be extinguished by the Act, except to the extent that it was necessary in order to confirm individual Spanish or Mexican grants. This can be conclusively established in a number of ways.

First, Congress knew that the Indians possessed Indian Title to almost all of California in 1851, which is why they voted the money "to treat with the California Indians." They also

knew, as appears in the statutory history, that this Indian land included the most productive gold-mining areas. In fact, those areas swarmed (to use a Congressional expression) with Indians. Analysis of the 100,000-150,000 words (comprising the discussion on the floor of the Senate on the 1851 Act) will show that not a single Senator raised a single question as to (1) what would happen if the Indians put in claims especially in the gold-mining areas, or (2) if this would serve to extinguish Indian Title, was it consistent with overall national policy. (See Congressional Globe, 31st Congress, 2nd Session, pp. 157-160, 284, 347-352, 359-365, 371-378, 387-391, 403-408, 426-430, 438-439, 451).

Second, the tried and true method selected by Congress to extinguish the Indian Title of California Indians -- the treaty method -- was diametrically opposed to any requirement of claim-filing by Indians under the 1851 Act. In Heaven's name, what purpose would be served by requiring Indians (assuming that they knew about the Act and could comply with it) to file claims for land which they had just divested themselves

of by signing a treaty?

The Act of March 3, 1853, An Act to Provide for the Survey of the Public Lands of California (referred to as the 1853 Act) was a package with the 1851 Act. The first would separate off the public domain land; the second would distribute it, by preemption. The following quotation from the statutory history of the 1853 Act shows conclusively that Congress did not intend the extinguishment of Indian Title, or to drive the Indians off their land (excluding the areas of the grants and the area covered by Section 16 of the 1851 Act). Mr. Gwin is Senator Gwin of California who, as the only California Senator functioning at the time, carried the complete load of passing the 1851 and the 1853 Acts.

We quote the discussion from the Congressional Globe, Vol. 24, Part 3, pp. 1772-3:

> "Mr. FELCH. I wish to offer an additional proviso to the sixth section.
>
> The amendment was read, as follows:
>
> And provided further, That this act shall not be construed to authorize any settlements to be made in any tract of country in the occupation of any Indian tribes, or to grant preemption right to the same.

Mr. GWIN. The rights of the Indians to territory in California are merely possessory; I would like to learn from the Senator from Michigan whether this would have any reference to certain settlements made by the Board of Indian Commissioners under treaties which they made and which, perhaps, it is not improper to say were not confirmed by the Senate. They had been placed on portions of the public land they did not occupy before. I am quite willing to concede that these Indians have possessory rights if they had them when the country came into the possession of the United States, when they occupy the same locations, but there are at present very few of them in the agricultural districts. Those who are located in the agricultural districts are chiefly at the mission stations. I believe there were at one time some thirty thousand Indians in the various missions in California. There are some few Indian villages on the Sacramento and other rivers. There is one on Captain Sutter's possessions. But they are diminishing every year, and I am not anxious to disturb them in their possessions, but am also unwilling to acknowledge any right of soil in these tribes. Let them remain at the villages they now occupy, and confine the operation of the proviso to that object, and I will not oppose it.

* * *

Mr. FELCH. My object in offering this amendment is certainly not to embarrass any of the settlers of California. A suggestion was made by the Senator from Virginia, that we might possibly, in legislating on this matter, be interfering with some of the rights of the Indians of that country. The truth is, that we have little actual knowledge on the subject of the Indian tribes in that country. Offi-

cially, we have none, for I believe we have no treaties that ever were made with any of them. It is, however, understood that a large portion of the country occupied by the whites is relieved of the original inhabitants. Still I understand that there are portions of the country to which the Indians have retired -- perhaps mineral portions -- and which they are occupying to a considerable extent. My object was to avoid the possibility of white people going among the Indians and making settlements, and claiming that the United States had given sanction to it by this law in opposition to the rights of the Indians. The way to get rid of the Indians is not by sending white men to claim rights among them. It is to form treaties with them, as the Government has heretofore done, according to the provisions of the Constitution. Although this bill is intended to provide for those settlers who are now there, and those who may go there within a limited time, I think we should endeavor to keep it free from all embarrassments of the kind to which I have alluded. I therefore apprehend, that while this proviso will not interfere with any settlements made there, because the settlements will be made where there are no Indians, yet I think it is a safeguard which is due to the Indian themselves, and which we ought to throw around their rights. I do not apprehend that this proviso will embarrass anybody; but, on the other hand, it seems to me to be quite proper that we should give the Indian that security which I desire to give him by this proviso.

Mr. GWIN: I shall not oppose it. I do not think it will have any particular bearing any way."

In this case Congress was following a pattern, set many years before, of providing a reservation in public lands disposal statutes of lands either in the possession or occupation of Indians, or lands to which the Indian Title had not been extinguished. By incorporating the 1841 Act into the 1853 Act Congress made doubly sure that Indians would be protected.

Had there been this disproved intention on the part of Congress to remove the Indians from their land and scatter them, this would have been an arrant violation of the provision of the Treaty of Hidalgo (1848) which provided:

> "And finally, the sacredness of this obligation shall never be lost sight of by the said Government, when providing for the removal of the Indians from any portion of the said territories, or for it's [sic] being settled by citizens of the United States; but on the contrary, special care shall then be taken not to place it's [sic] Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain."

Probably the most conclusive proof that nobody at the time believed that the Indians were required to file claims at the risk of losing their Indian Title is the fact that the arch-enemy of the Indians, the main mover behind the rejection of the treaties,

the main mover behind the genocide against the Indians, the mover of a resolution which called for the removal of all Indians from the state -- the State Legislature -- instead of being overjoyed at the failure of Indians to file under the 1851 Act, in 1856 adopted a resolution directed to Congress requesting the extinguishment of Indian Title in California.

> "Senate concurred with the Assembly resolution requesting the California Senator and Representatives in Congress to urge upon Congress the necessity of immediate action to provide some means for extinguishment of Indian Land Titles to lands in California." (Senate Journal, 1856, p. 598)

The pellucidity of Congressional intention explains why, as late as 1924, the Solicitor General and the Attorney General of the United States vehemently and passionately argued to the Supreme Court that the 1851 Act did not require claim-filing by Indians to avoid extinguishment of their Indian Title. See United States v. Title Insurance Company, 265 U.S. 472. As an examination of the Government Briefs in Cramer v. United States, 261 U.S. 219, will demonstrate, there, too, the Government fought for the principle that the 1851 Act

did not and could not extinguish Indian Title.

Considering the cost to the Government of an extinguishment of Indian Title in California, their stick-to-itiveness in arguing non-extinguishment by the 1851 Act is conclusive proof that that is exactly what Congress intended.

The Court below bases its affirmance on the proposition that, as a matter of law, and irrespective of the special facts involved, every California Indian tribe lost its Indian Title if it did not file a claim under the 1851 Act. For this proposition it cites Barker v. Harvey, 181 U.S. 481, U. S. v. Title Insurance Co., 265 U.S. 472 and Super v. Work, 3 F (2d) 90, aff'd. 271 U.S. 643.

In order to avoid undue length, and to profit by the research, logic and passion of the Government (a very interested party), we will use their Title Insurance Brief, by reference, to help argue that the state of the law and the details of the 1851 Act demonstrate its non-applicability to Indian Title. The Brief states the well-known proposition that Indian Title will be extinguished by the United States only with the consent of the Indians. Furthermore, such Title will be considered extinguished only when such purpose is clearly indicated. Missouri v. Roberts, 150 U.S. 114-118; Leavenworth v. U.S., 92 U.S. 733, 742; U.S. v. Winans, 198 U.S. 371, 382.

The Brief points out several aspects of the Act which demonstrate the impracticability, if not the impossibility of Indian claims. For example: (1) the

Act was administered only in the Spanish and English languages; (2) the Act speaks in terms such as documentary evidence and deraignment of claims title, etc.; (3) issuing a patent to the successful claimant is an unheard of procedure for Indian Title, because it does not produce Indian Title but an entirely different kind of title, patent or fee title.

The Brief refers to the April 22, 1850 California law which provides:

> "Persons and proprietors of lands on which Indians are residing, shall permit such Indians peacefully to reside on such lands unmolested in the pursuit of their usual avocations for the maintenance of themselves and their families."

This law was obviously known to Congress, which obviously did not intend to undercut it.

The Brief further points out the contradiction between the treaty negotiations and the idea that a claim had to be filed under the 1851 Act; referring to the fact that $25,000 was voted for treaty negotiation four days before the 1851 Act was passed.

The Brief quotes from the 1853 Act:

> "This Act shall not be construed to authorize any settlement to be made on any Tract of Land in the occupation or possession of any Indian Tribe, or to grant any preemption right to the same."

and notes that this provision contradicts the idea

that the Indians would lose their title by not filing, as well as the suggestion of Barker that Indian Title and public domain are mutually exclusive.

The main argument of the Brief is the fundamental one that Indian Title was not derived from the Spanish or Mexican government, but had existed independent of such governments.

In addition to the arguments made in the Brief we have some of our own to add.

Examination of the hundred or more decisions of the Supreme Court applying this Act produces a certainty that the Supreme Court never would have been willing to confirm Indian Title. The Court's standards are based upon the assumption that only formal grants, meticulously proved, could establish confirmable title. See U.S. v. Cambuston, 61 U.S. 59, U.S. v. Castro, 65 U.S. 346, Luco v. U.S., 64 U.S. 515, U.S. v. Vallejo, 66 U.S. 541, U.S. v. Castilere, 67 U.S. 17.

Somewhat similar to Indian Title on its facts is U.S. v. DeHaro, 92 U.S. 599, which held non-confirmable a license, or provisional grant or terminable right of occupancy.

Almost conclusive is the evidence that, except for the Mission, "civilized" agricultural or pueblo Indians, the law of Mexico did not recognize any title or property rights in the Indians. William Carey Jones was delegated by the Secretary of State and the Interior, to inquire into the law of Mexico, including Indian rights. His report, which was received in 1850 and transmitted to the Congress, states:

> "(Made in Pursuance of Instructions From the Secretary of State and the Secretary of the Interior, by William Carey Jones)
>
> (Senate Ex. Doc. 18, 31st Cong., 2d Sess., Cong. Doc. Series 589)
>
> I am also instructed to make 'an inquiry into the nature of the Indian rights (in the soil) under the Spanish and Mexican governments.'
>
> It is a principle constantly laid down in the Spanish colonial laws, that the Indians shall have a right to as much land as they need for their habitations, for tillage, and for the pasturage of their flocks. When they were already partially settled in communities, sufficient of the land which they occupied was secured them for those purposes. If they were wild and scattered in the mountains and wildernesses, the policy of the law, and the instructions impressed on the authorities of the distant provinces, was to reduce them, establish them in villages, convert them to Christianity, and instruct them in useful employment. California was not excepted from the operations of this rule. It was for this purpose especially that the missions were founded and encouraged. The instructions, heretofore quoted,

> given to the commandant of upper California in August, 1773, enjoin on that functionary that 'the reduction of the Indians in population as the spiritual conquests advance, shall be one of his principal cares;' that, the reduction made, 'and as rapidly as it proceeds, it is important for their preservation and augmentation to congregate them in mission settlements, in order that they may be civilized and led to a rational life; which (adds the instructions) is impossible if they be left to live dispersed in the mountains' (p. 32).
>
> * * *
>
> "In the wild or wandering tribes, the Spanish law does not recognize any title whatever to the soil (p. 34)."

For a reference to Jones' authorization and competence see U.S. v. Vallejo, 66 U.S. at 552.

Were Indian Title confirmable, it is inconceivable that they could be confirmed without Indian testimony and Indians would have been disqualified from testifying before the Commission or the District Court. California statutes forbade testimony by Indians. (1850 Cal. Stat. 230, 1851 Cal. Stat. 114, 1854 Cal. Stat. 67, 1861 Cal. State. 522, 1863 Cal. Stat. 60, 69). Presumably California rules of evidence would cover 1851 Act proceedings.

A decision under the 1851 Act, U. S. v. Sutter, 62 U.S. 170, on an evidence question cites Patterson v. Wynn, 30 U.S. 232. Referring to Patterson we find Justice Story applying the evidence law of Georgia to a case tried in a federal court within Georgia.

If Indians had to file to keep from losing their land then, having proved their Indian Title, under the provisions of the Act either they got a patent (fee) or else they got nothing. If they got nothing, presumably their Title was extinguished. If they got a patent, they got what all California Indians would have considered unacceptable. They were substituting the common ownership of land for individual proprietorship: and they were substituting land that could be lost for land that could not be lost.

Assume, arguendo, that this Court concludes Petitioner was required to file under the 1851 Act. We then submit to the Court some hard questions.

1. What if the Tribe did not file its claim because its "guardian" fraudulently, or perhaps only negligently, failed to advise it of the passage of the statute and the necessity of filing a claim?

2. What if the Government fraudulently, or perhaps only negligently, failed to advise the Tribe that the treaties had not been ratified, so that claims now had to be filed or else Indian Title was lost?

3. What if, because of violence which was financed and assisted by the State or Federal Government, the Tribe was unable to file and prosecute a claim?

4. What if, because of the genocide financed and assisted by the State or Federal Government, the Tribe was unable to file or prosecute its claim because the tribal leadership had been killed or driven off the land?

5. What if the loss of the land meant to the Tribe an almost complete destruction of the Tribe's culture, religon and economy?

6. What if the loss of the land upon which the Tribe was completely dependent for food and sustenance resulted in the death of a great majority of members of the Tribe since, until 1875, only a white man could obtain public land; and for long after that then only an Indian who had separated himself from his Tribe?

The facts suggested by these hard questions Plaintiff was prepared to prove either at the trial or at the "constitutional fact" hearing it requested. Since the demurrer admits what is in the complaint, and a refused hearing admits what was offered to be proved,

this Court must assume these facts to be true in disposing of this case.

We submit as exquisitely apposite, the discussion in Carino v. The Insular Government, 212 U.S. 449.

The Court below relies on Barker and Title Insurance. We have no quarrel with their holdings if they are limited to their special facts, which means that they are limited to cases where grants were confirmed, or to lands and Indians described in Section 16 of the Act.

Such a reading is required to integrate them with Cramer. Since Title Insurance followed closely on Cramer, and the Court was the same except for one Justice, and both decisions were unanimous, such an integration seems warranted.

The losing party, the railroad, fought gamely to convince the Cramer Court that the Indians (who were not on grant land and did not at all meet the Section 16 specifications) were obliged to file claims and their title was extinguished for lack of filing. If one will carefully examine the Court's opinion it will appear that the Court did not take the easy way out -- that the Indians were not on the

land at the time the 1851 Act was passed. As a matter of fact, the record shows that the U. S. Attorney was claiming a pre-1851, in fact, a from-time-immemorial occupancy. Perhaps this is why the Court did not avoid the issue. But more likely is that the Court was trying to avoid the reductio ad absurdum the railroad was trying to push it into.

If it recognized a quasi-Indian Title in Indians who moved on to the land on March 4, 1853 how could they be better situated than Indians who were on the land on March 3, 1851 and continued to live on it? Or would it be argued that Indians would be forced to leave their ancestral lands for a year or two, and then return to get the benefit of Cramer -- just the opposite of what Cramer said it was trying to accomplish.

Another reason why the Cramer Court avoided the pitfall of declaring Indian Title extinguished was because it read the statute carefully and noted that the word "extinguished" is not used in the statute. The only effect of not filing a claim on land where no grant was confirmed was that such land went into the public domain, to be disposed of as the 1853 Act provided, or as Congress should later decide. The Court knew that Indian Title was not inconsistent

with being in the public domain, as a reading of the 1853 Act demonstrates, and as was held in Missionary Society v. Dallas, 107 U.S. 336, 344; Buttz v. Northern Pacific, 119 U.S. 55, 70; St. Paul v. Phelps, 137 U.S. 528, 541.

Interpreting Barker and Title Insurance as we have done does not in any way limit the effectuation of the one and only purpose of the 1851 Act. That purpose was to determine which were the valid Spanish and Mexican grants. It was not to find out where Indian Title ran. The Government had better ways to determine where Indian Title lay -- in fact, the Commission never could have made a proper determination of this question.

If Barker and Title Insurance had actually purported to go beyond the facts of their case to a case like Cramer, or like ours, it would be dicta, pure and simple. For a determination, in Barker and Title Insurance, as to what going into the public domain does to Indian Title, was meaningless. The land of those Indians was not going into the public domain.

We disagree with the Government that Indians did not have to file claims on the Title Insurance facts. Having studied the factual situation in Barker and

Title Insurance, realizing that Mexican grants and Indian Title on the grant lands got all mixed up together -- sometimes the Indian Title, or protection or easement was even written into the grant, 1/ on at least one occasion an Indian was given a grant (U. S. v. Ritchie, 58 U.S. 525), we can understand why the Court felt the Indians should have been before the Commission when the decision was being made. Leave aside whether any Indian tribe had any chance of ending up with a patent, or a condition attached to a patent, the Court was not unreasonable in saying that the Indian Title "derived from the Mexican Government." How could it be denied, if the grant provided for it, in so many words?

It must be that Congress, equipped with a knowledge of Mexican law by Jones' Report, foresaw how matters would develop on this issue. Realistically anticipating the possibility that the Indians would end up out in the cold, they enacted Section 16 so Congress could be informed of which Ihdians were out in the cold, and, perhaps, do something about it.

Petitioner Tribe was about as far removed as was possible, geographically, socially and in every

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1/ Also see U.S. v. Arrendondo, 6 Pet. 691, 693; U.S. v. Armijo, 5 Wall. 444, 447.

way from the Section 16 categories. Therefore a "rule of property" in its favor was established by Cramer, if it was not clearly established already by the long line of Supreme Court decisions protecting Indian land from taking without Indian consent.

The theory of a "rule of property" is that it protects the buyer who, presumably, hears about and relies upon a series of court decisions. Faced with the inability of a preemption to occupy land already occupied or possessed by an Indian (1853 Act) it would take a lot of gall for a preemptor to assert that he relied upon Barker or Title Insurance, but not Cramer.

We asserted in our complaint, and again in our Petition for a "constitutional fact" hearing that the impact of the taking of Pitt River land violated the First, Fifth and Ninth Amendments because of its effect on the religion, culture, economy and health and even lives of the tribal members. Candor requires us to admit that no act or series of acts or statute having to do with deprivation of Indians of their land has reached the degree of horrendousness required to reach constitutional proportions. We believe we have such a situation here in the almost complete obliteration of a religion, a culture, and

-- to a lesser extent, though still substantial -- of a people.

As Jane Addams once said, "When if not now; who if not you."

But, if this Court does not choose to give constitutional significance to the sad saga of the Pitt River Tribe and the California Indians, at least it should adopt a statutory interpretation which would avoid constitutional problems.

CRAMER CAUSE OF ACTION

This litigation is keyed, of course, to the question of whether Pitt River Indian Title was extinguished, but it is, of course, on several levels. Level two is the cause of action founded upon the Cramer decision.

While couched in language which suggests merely a ruling on a special demurrer, which it is not, the decision of Court of Appeal actually is a declaration that turns Cramer into a dead letter. The Court says the allegations constitute "no more than a conclusion of law." How can this be? Is the allegation that Petitioner "occupied" certain specific land a conclusion of law? Why, you may ask, was the complaint couched in such terms?

The answer is that if one were pleading a libel, it would be simple -- follow the words of the statute.

He made a publication. It was false. He intended to defraud. I relied upon it. I was damaged thereby. But, what are the necessary allegations on a Cramer cause of action? Can anybody read Cramer and say whether occupation (or possession, if they differ in meaning) is enough? One could reason from the Land Decisions the Court cites that occupying at least with "improvements of any value whatever" is enough (3 L.D. 371). Incidentally, this language comes from the original General Land Office circular which was first issued in 1884 and spawned a progeny of follow up Circulars and Land Office decisions protecting Indian occupancy.

What complicated the pleading problem was that in the case of certain defendants there are ten, twenty or perhaps as many as fifty different areas where Cramer occupations are claimed. Putting the historical facts together so as to allege length of occupation, buildings, fencing, etc. would be a difficult, if not impossible task. Such a task is never imposed on a litigant in advance of his pleading, and it is imposed in addition to the amorphous standard established by Cramer.

What safer method of pleading could there be than to say whatever you require in Cramer we plead. Is

the law just a highly intellectualized guessing game? For example, Cramer found occupation since 1859, a fence, a dwelling house and divers out-buildings. Does this mean that without a fence, or with only a five-year occupancy no cause of action is stated? Does this mean that Indians trying to take advantage of Cramer must run a "law and motion" obstacle race, with lawyers filing briefs on such questions as whether a lean-to is enough, or whether an Indian must spend all year, instead of a few months, to get Cramer protection? Obviously these are questions for the trial court, in which the Indian will describe his tribe's particular life style and it will, hopefully, not be forced into a procustean bed, as the Court of Appeal is trying to do with Petitioner at the law and motion stage.

We note that even in criminal cases, where there are important constitutional reasons for specificity, pleadings in the words of a statute are sufficient. Though this Court has not yet spoken, such a practice has been approved by Kaneshiro v. U.S., 445 F (2d) 1266; U. S. v. Mixon, 374 F (2d) 20; U. S. v. Roberts, 296 F (2d) 198; Stein v. U. S., 313 F (2d) 518; Davis v. U. S., 253 F (2d) 24.

Is this not the kind of problem which cries out for "the superior justice which looks only to the substance of the right, without regard to the technical rules"? Choctaw Nation v. United States, 119 U.S. 1. Also see Jones v. Meehan, 175 U.S. 1.

1853 ACT CAUSE OF ACTION

We now step down to the third step, a cause of action founded upon the fourth proviso of Section 6 of the 1853 Act, based upon the protection from pre-emption of "land in the occupation or possession of any Indian Tribe." The cause of action which the Court rejects reads as follows:

> "The patents, if any, from the United States Government to defendants' predecessor covering Kimberly-Clark Claim were void for violation of Section 6 of the Act of March 3, 1853 either because the land was occupied at the time of the patent by plaintiff, or such occupation was ended by murder and genocide committed by the patentee in order to be able to receive the patent to the land in question. (Ninth Cause of Action).

Read as broadly as it must be, after demurrer, this is an allegation not only that Petitioner was occupying the land, but that defendants' predecessors had full knowledge of it, defrauded Petitioner and the Government in securing a patent to which they were not entitled, and used violence up to the point of murder in order to be able to obtain the patent.

In the face of an allegation such as this, the Court below concluded that Petitioner does not show sufficient interest or entitlement! The Court then goes on to suggest that the only remedy, if any, would be a suit brought by the Government to recover or set aside the patent. This simply is not the law in any respect. There are circumstances in which only the Government can sue to set aside a patent, but this does not apply to all situations. Moreoever, the remedy of the injured person is not limited to setting aside the patent. The Court can order the patentee to hold the patent in trust for the other party, or in abeyance until the other party has a chance to perfect his claim. Furthermore, it is well established that in many situations, though not all, an attack on a patent can be used defensively or offensively in an ejectment proceeding. Finally, it should be pointed out that most of the cases which limit action against the patentee are cases where the claim is simply that a mistake has been made. Almost never do these cases involve the issuance of a patent which is void because the land has been reserved (as in this case); and never in a case where the patent was procured by fraud. A few of the relevant cases are: Duluth Iron

Range v. Roy, 173 U.S. 587; Wright v. Roseberry, 121 U.S. 488; Doolan v. Carr, 125 U.S. 618; United States v. Beebe, 127 U.S. 338; Hedrick v. Atchison, Topeka, 167 U.S. 673; Kessell v. St. Louis, 59 U.S. 19; Johnson v. Towsley, 13 Wall. 72; Bagnell v. Broderick, 13 Pet. 436. Also see 5 Op. Atty. Gen. 7; 4 Op. Atty. Gen. 558; 1 Op. Atty. Gen. 458.

Respectfully submitted

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